IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KIM L. LEE, Respondent, v. SAFEWAY STORES, INC., Appellant, DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON Defendant.	No. 42240-9-II ORDER AMENDING OPINION

The opinion previously filed in this case on September 18, 2012, is hereby amended as follows:

Remove"Thurston County" and insert "Pierce County" on the sixth line of page 4 of the opinion.

Accordingly, it is

SO ORDERED.

DATED this _____ day of _____, 2012.

_____
QUINN-BRINTNALL, J.

We concur:

_____
VAN DEREN, J.

_____
JOHANSON, A.C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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KIM L. LEE, Respondent, v. SAFEWAY STORES, INC., Appellant, DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant.	No. 42240-9-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — In this industrial insurance appeal, Safeway Stores, Inc. assigns error to the superior court's partial reversal of a Board of Industrial Insurance Appeals (Board) order granting summary judgment in its favor. Safeway argues that the superior court erred in finding a genuine issue of material fact as to whether Safeway had notice of Kim L. Lee's change of address before issuing an order closing her worker's compensation claim.[1] Because the

[1] Lee filed a cross appeal alleging that the superior court erred by affirming the Board's determination that Safeway mailed notice of the closing order to her attending physician. On June 20, 2012, this court dismissed Lee's cross appeal as untimely. Even if we entertained Lee's claim, it has no merit because Lee failed to follow the appropriate procedures for a change in attending physician as required by WAC 296-20-065. Although the Department of Labor and Industries is a named party in the instant case, it has not filed a brief or participated in oral argument in this court.

relevant inquiry is whether Lee notified Safeway of her change of address before it issued the closing order, we hold that the superior court erred by reversing the Board's order and remanding for a determination of whether Safeway received notice of Lee's address change from a third party. Accordingly, we reverse the portion of the superior court's order denying Safeway's motion for summary judgment and remand with directions to enter summary judgment for Safeway.

FACTS

On August 14, 2006, Lee sustained an industrial injury to her back in the course of her employment with Safeway, a self-insured employer. On March 6, 2007, Lee filed an SIF-2 application for benefits (claim number SB41082) for her back injury. Lee listed her address as 13802 6th Ave. E., Tacoma, WA 98445 on the SIF-2. On August 16, 2007, Safeway issued an order closing Lee's back claim. Safeway mailed the closing order to Lee at the address she had listed on the SIF-2 and to Lee's attending physician, Dr. Kaufman.

On February 6, 2007, Lee retained attorney David B. Vail to represent her on her worker's compensation claims. The Vail Firm[2] sent Safeway a notice of representation and change of address letter the same day, addressed to "Zenith Administrators" in Seattle, Washington. The letter stated that the Vail Firm represented Lee as to the back claim only. The Vail Firm also sent a notice of representation and change of address to the Department of Labor and Industries (L&I), noting its representation for both her back claim and an additional unrelated respiratory claim.

[2] For clarity, we refer to the attorney(s) representing Lee as the "Vail Firm."

On September 24, 2008, over one year from the date Safeway closed the back claim, the Vail Firm sent Safeway a letter notifying Safeway of a change of address for the back claim. On November 4, the Vail Firm mailed "a protest to any adverse order that may have been issued up to that point" as to the back claim. Administrative Record (AR) at 22. On December 3, 2008, the Vail Firm "submitted a specific protest to the August 16, 2007 order, asserting that the order should have been communicated to Dr. Lester Pittle as Ms. Lee's attending physician." AR at 22. The Vail Firm averred that because Safeway had not notified Lee's attending physician, the August 16 order closing her back claim was neither final nor binding.

On March 12, 2009, L&I issued an order cancelling the closing order in response to the Vail Firm's December 3, 2008 protest. L&I affirmed on July 15, 2009, and sent its order to Safeway at the following address: "Safeway Seattle Division, MS 7250, Phoenix, AZ 85038-9043." AR at 28. Safeway requested reconsideration, attaching a declaration from Dr. Pittle in which he states he was never Lee's attending physician for the back claim. L&I forwarded Safeway's reconsideration request to the Board as a direct appeal. Safeway moved for summary judgment.

On February 2, 2010, an industrial appeals judge (IAJ) held a telephonic hearing on Safeway's summary judgment motion.[3] Safeway averred that it had never received the February 6, 2007 change of address letter addressed to "Zenith Administrators." The Vail Firm argued genuine issues of material fact remained as to whether Safeway had notice of its representation for the back claim because Safeway conceded it knew of the Vail Firm's representation in an

[3] For its part, L&I filed a notice of appearance and responded to Safeway's motion, explaining its reasoning for its March 12, 2009 cancellation of Safeway's closing order. RCW 51.52.110.

unrelated claim. The IAJ determined that because Dr. Pittle was not Lee's attending physician on the back claim and Lee did not notify Safeway of an address change before August 16, 2007, Safeway properly communicated the closing order to Lee and Dr. Kaufman, her attending physician.

On March 5, 2010, the IAJ issued a written proposed decision and order granting Safeway's motion for summary judgment and reversing L&I's July 15, 2009 order. The Board denied Lee's petition for review and adopted the IAJ's proposed decision and order on May 6, 2010. Lee timely appealed to the Thurston County Superior Court. RCW 51.52.110.

On May 20, 2011, the superior court affirmed the portion of the May 6, 2010 order based on its finding that Dr. Pittle was not Lee's attending physician for the back claim. But the superior court reversed and remanded the balance of the order, finding genuine issues of material fact as to whether Safeway properly communicated the closing order to Lee's representative, the Vail Firm. Safeway timely appeals only the portion of the superior court's order reversing the Board's May 6 order.

ANALYSIS

"Washington's Industrial Insurance Act [(IIA), ch. 51.12 RCW,] includes judicial review provisions that are specific to workers' compensation determinations." *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179, 210 P.3d 355, *review denied*, 167 Wn.2d 1015 (2009). In particular, the IIA provides that the superior court reviews an appeal of the Board's decision and order de novo, based on the record before the agency. RCW 51.52.115. The superior court presumes the Board's findings and conclusions are "prima facie correct." RCW 51.52.115. The

challenging party has the burden to overcome the presumption by a preponderance of the evidence. RCW 51.52.115; *Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 291, 253 P.3d 430 (quoting *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999)), *review denied*, 172 Wn.2d 1008 (2011).

Unlike a typical appeal governed by the Administrative Procedures Act, ch. 34.05 RCW, in an appeal governed by the IIA, we do not sit in the same position as the superior court. *Rogers*, 151 Wn. App. at 180. Rather, our "'review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings.'" *Rogers*, 151 Wn. App. at 180 (quoting *Ruse*, 138 Wn.2d at 5). We review the evidence in the light most favorable to the party who prevailed in superior court. *Rogers*, 151 Wn. App. at 180 (quoting *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221, *review denied*, 147 Wn.2d 1011 (2002)). We do not "reweigh or rebalance the competing testimony and inferences, or . . . apply anew the burden of persuasion, for doing that would abridge the right to trial by jury." *Rogers*, 151 Wn. App. at 180-81 (quoting *Gagnon*, 110 Wn. App. at 485).

Nonconflicting rules of civil procedure apply to Board proceedings. WAC 263-12-125. "Summary judgment is appropriate if, viewing the pleadings [and] affidavits and all reasonable inferences therefrom in the light most favorable to the nonmoving party, there is no genuine dispute of material fact, and the moving party is entitled to judgment as a matter of law." *Dep't of Labor & Indus. v. Kaiser Aluminum & Chem. Corp.*, 111 Wn. App. 771, 778, 48 P.3d 324 (2002) (citing *Smith v. Emp't Sec. Dep't*, 100 Wn. App. 561, 568, 997 P.2d 1013 (2000)). "A

material fact is one upon which the outcome of the case depends, in whole or in part." *Kaiser Aluminum*, 111 Wn. App. at 778 (citing *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)). A party opposed to a motion for summary judgment "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." CR 56(e). Generally, we review summary judgments de novo and engage in the same inquiry as the decision maker. *Kaiser Aluminum*, 111 Wn. App. at 778 (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

Here, Safeway assigns error to the superior court's partial reversal of the Board's order, arguing that it complied with all statutory requirements in communicating its August 16, 2007 closing order. Lee responds that the superior court did not err because a genuine issue of material fact exists as to whether Safeway had actual notice of her change of address for the back claim. Because there are no disputed issues of material fact as to whether Lee notified Safeway of her change of address before Safeway issued the August 16, 2007 closing order, we hold that the superior court erred in reversing the Board. Accordingly, we reverse the superior court's order denying summary judgment.

Generally, "written notices, orders, or warrants must be forwarded directly to the claimant until such time as there has been entered an order on the claim appealable to the" Board. RCW 51.04.080. But if before an order is entered a claimant "sets forth in writing the name and address of the representative to whom the claimant desires this information to be forwarded," L&I or the self-insured employer should forward all such notices and warrants to the representative. RCW

51.04.080; former RCW 51.52.050(1) (2008); WAC 296-15-450(5). Thus, when a worker notifies L&I or the self-insured employer of a change of address to that of her attorney, L&I or the self-insured employer must send a copy of its order to the attorney's address to be "communicated" within the meaning of former RCW 51.52.050(1). RCW 51.04.080; *In re David P. Herring*, Nos. 57,831 & 57,830, Bd. of Indus. Ins. Appeals (Wash. July 30, 1981); *In re Pamela K. Miller*, No. 05 12252, Bd. of Indus. Ins. Appeals (Wash. Jan. 11, 2006). But if a worker retains an attorney and fails to notify L&I or the self-insured employer of the address change, the closing order becomes final 60 days after L&I or the self-insured employer communicates the order to the worker at her last known postal address and to the worker's attending physician. Former RCW 51.52.050(1); *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 719, 213 P.3d 591 (2009).

Safeway contends it was not required to send notice of the August 16, 2007 closing order to the Vail Firm because Lee did not notify it of a change of address to the Vail Firm until September 24, 2008. We agree. It is undisputed that Safeway is a self-insured employer authorized to close Lee's claim. WAC 296-15-450. The record shows that Safeway did not receive a change of address letter naming the Vail Firm as Lee's representative until September 24, 2008. Lee has submitted no evidence showing that Safeway received the February 6 letter addressed to "Zenith Adminstrators." Safeway's Risk Management address is "P.O. Box 85001, Bellevue, WA 98015-8501."[4] AR at 23. But on February 6, 2007, the Vail Firm wrote Safeway a change of address letter and mailed it to "Zenith Administrators, P.O. Box 21505, Seattle, WA

[4] It appears that correspondence to Safeway's Risk Management office may also be sent to a Phoenix, Arizona address.

98111." AR at 21. No evidence shows the change of address letter reached the relevant Safeway claims examiner or, indeed, any person connected to Safeway.

Lee and the Vail Firm failed to notify Safeway of any address change before August 16, 2007, and Safeway is entitled to summary judgment as a matter of law. CR 56(e); former RCW 51.52.050(1); *Shafer*, 166 Wn.2d at 719. Safeway mailed copies of the August 16, 2007 closing order to both Lee and her attending physician, Dr. Kaufman. Absent a protest, request for reconsideration, or appeal, the closing order became final on October 16, 2007. Former RCW 51.52.050(1). Lee did not protest the closing order until more than a year later on November 4, 2008, well past the 60-day period. Former RCW 51.52.050(1). Accordingly, because Lee has failed to show any genuine issue of material fact as to whether she notified Safeway of her change of address before August 16, 2007, the superior court erred by denying Safeway's summary judgment motion.

Lee argues that a genuine issue of material fact exists as to whether Safeway had notice of the Vail Firm's representation on the back claim because Safeway had notice of the Vail Firm's representation of the other, unrelated respiratory claim. Lee's argument is unpersuasive. Safeway mailed notice of a closing order for the respiratory system claim to the Vail Firm on May 11, 2007. The record is devoid of any explanation as to how Safeway learned of the Vail Firm's representation on the respiratory claim. The Vail Firm speculated that L&I must have informed Safeway of the representation after L&I received a February 6, 2007 letter from the Vail Firm notifying it that the Vail Firm was representing Lee in both her back claim and respiratory claim.

The Vail Firm argued that because the February 6, 2007 letter to L&I referenced the claim

numbers for both the back claim and the respiratory claim, L&I must have notified Safeway of its representation on the back claim as well as the respiratory claim. But L&I had no obligation to inform Safeway of the representation and Safeway had no obligation to seek out information from L&I and the record contains no evidence that they did. Moreover, the Vail Firm's speculative argument is irrelevant to a determination of whether Lee fulfilled her obligation to notify Safeway of her address change as required by RCW 51.04.080.

Accordingly, we reverse the superior court's order denying Safeway's motion for summary judgment and remand with directions to enter summary judgment in favor of Safeway.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

JOHANSON, A.C.J.